

**2017 P T D 1852**

**[Sindh High Court]**

**Before Mohammad Shafi Siddiqui, J**

**CHINA HARBOUR ENGINEERING COMPANY LTD. through Liu Ce**

**Versus**

**PAKISTAN through Secretary Revenue Division and 3 others**

Suit No.991 and C.M.As. Nos.9048, 9819 to 9822 of 2015, decided on 24th July, 2015.

**Income Tax Ordinance (XLIX of 2001)----**

---Ss. 121, 124(4), 129, 132 & 137(2)---Specific Relief Act (I of 1877), Ss. 39, 42 & 54---Suit for cancellation, declaration and permanent injunction---Best judgment assessment---Assessment giving effect to an order---Disposal of appeal by the Appellate Tribunal---Due date for payment of tax---Commissioner Inland Revenue (Appeals) had been directed to decide the plaintiff's appeal within certain period and till final disposal of the plaintiff's appeal, the defendants had been restrained from taking any coercive action against the plaintiff---Tabulation made by the plaintiff, wherein certain heads of account had been either deleted or sent for rectification under S. 221 of Income Tax Ordinance, 2001, was not disputed---In terms of S. 124 (4) of the Income Tax Ordinance, 2001, where direct relief was provided in order under Ss. 129 & 132 of the Ordinance, the Commissioner would issue Appeal Effect Order within two months of the date the Commissioner was served with the order---In pursuance of S. 137 (2) of Income Tax Ordinance, 2001, where any tax was payable under assessment order or amended assessment order or any other order issued by the Commissioner under the Income Tax Ordinance, 2001, a notice would be served upon the taxpayer in the prescribed form specifying the amount payable and thereupon the sum so specified would be paid within 15 days from the date of the service of the notice--Original demand notice had been issued prior to amended assessment; hence, the same was not sufficient compliance of issuing notice of demand in pursuance of amended assessment to provide opportunity of 15 days specifying the total amount in pursuance of amended assessment---Compliance to Ss. 124 (4) & 137(2) of Income Tax Ordinance, 2001 was necessary---Appeal Effect Order was an amended assessment tabulation and the same had to be given effect like any other amended decree---High Court directed the defendants to deposit the amount, which had been recovered by them from the Bank account of the plaintiff, in the Court till further orders.

B.P. Industries (Pvt.) Ltd. v. Secretary Revenue Division 2008 PTD 1162 ref.

Dr. Mohammad Farogh Naseem for Plaintiff.

Sarfraz Ali Metlo for defendants Nos. 2 and 3.

**ORDER**

**MOHAMMAD SHAFI SIDDIQUI, J.**---Plaintiff has filed this suit challenging the show-cause notice dated 24.04.2015 and amended Order under section 122(5-A)(4) of Income Tax Ordinance, 2001 (hereinafter referred to as Ordinance, 2001) dated 18.05.2015. The suit was filed on 08.06.2015 and on 10.06.2010 this Court was pleased to pass interim order restraining the concerned from taking any coercive action against the plaintiff till disposal of plaintiff's appeal by the concerned Commissioner and the injunction application (C.M.A. No.9045 of 2015) was disposed of accordingly.

It is contended by learned counsel for the plaintiff that in terms of aforesaid order the Commissioner Inland Revenue (Appeals) was directed to decide the appeal on/or before 25.06.2015 which was accordingly decided on 26.06.2015, which pertains to the year 2009 and the order was served upon the plaintiff on 29.06.2015. It is urged by the learned counsel that in terms of such order a number of demands raised by the Adjudication Officer under different heads were deleted whereas some were maintained and the others were subjected to rectification and in consequence thereof application in hand for refund the amount recovered from the plaintiff under impugned demands along with application bearing C.M.A. No.9821 of 2015 seeking orders to restrain defendants from taking any steps towards recovery of the impugned demand in pursuance of order passed by the Commissioner Inland Revenue Appeals has been filed.

Learned counsel submits that on 01.07.2015 application in hand was considered and the plaintiff obtained an order on the strength that without giving effect to sections 124(4) and 137(2) of Ordinance, 2001 the recovery was made under coercion. He contended that no appeal effect order under section 124(4) of Ordinance, 2001 was passed and so also 15-days' time after notice under section 137 of Ordinance, 2001 was not given. He further contended that on 29.06.2015 notices were issued to the South Asia Pakistan Terminal Limited and Pakistan International Bulk Terminal Ltd., by the department whereas on 30.06.2015 the department approached the bank of the plaintiff, in particular Standard Chartered Bank Limited, however the orders were passed on 01.07.2015. Per learned counsel although cheques were prepared on 30.06.2015, but the same were encashed on the following day after the order was passed.

Learned counsel for the plaintiff contended that the elementary principle of law is that while disputes are pending, till the plaintiff exhausts final appellate hierarchy, extreme steps should not be taken and at least one independent forum should have decided the controversy. In the instant case the Commissioner Inland Revenue has not only modified the Order-in-Original but has deleted certain entries regarding which the appeal effect order had to be passed and a proper notice ought to have been given to the plaintiff giving 15-days' time to pay the impugned demand.

Learned counsel for the plaintiff in this regard relied upon the case of B.P. Industries (Pvt.) Limited v. Secretary Revenue Division reported in 2008 PTD 1162 involving the same question regarding appeal effect order in which it has been observed by the Federal Tax Ombudsman as under:--

"The aforesaid findings of the CIT (Appeals) were confirmed by the Income Tax Appellate Tribunal vide order dated 23.08.2000. It is, therefore, confirmed that the complainant's appeal before the CIT (Appeals) and Income Tax Appellate Tribunal partly succeeded and appeal effect had to be given under sections 132 and 135 of repeated Ordinance in the light of directions issued by the appeal authorities.

12. ...It is also settled and resolved issue that tax statute should be interpreted by the words used in the statute and in the light of what is clearly expressed, as enunciated by the Hon'ble Supreme Court of Pakistan in the case of Messrs Hirjina & Co. Pakistan, Karachi v. Commissioner of Sales Tax Central, Karachi. The relevant extract is reproduced hereunder:-

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"We may here observe that interpreting the taxing statute the Courts must look to the words of the statute and interpret it in the light of what is clearly expressed. It cannot imply anything which is not expressed, it cannot import provisions in the statute so as to support assumed deficiency."

Learned counsel submitted that the aforesaid judgment is persuasive in nature.

Learned counsel further relied upon the case of Maruti Suzuki India Limited v. Deputy Commissioner of Income Tax, which appears to be an unreported as in which it has been observed as under:--

"Once the appellate authority has passed an order in favour of the assessee, the appeal effect must be given by the Assessing Officer."

Learned counsel has also relied upon the case of Idea Cellular Limited v. Addl. Commissioner of Income Tax in which it has been observed that the assessing officer has not given appeal effect to the direction of CIT(A). In the course of the hearing the tabulation had also been furnished which purported to be a working of the demand, which was remained payable once the appeal effect was granted qua the direction of the CIT(A).

Similarly in the case of A.C.I.T. v. I.C.I.C.I. Bank Limited it has been observed as under:--

"From the perusal of the grounds of appeal it seems that the Revenue is not aggrieved by the order of the Ld. (CIT(A) in this respect but is only wondering how the appeal effect can be given. Simply because the demand has been generated by the system, cannot be an excuse for not giving appeal effect to the orders of the appellate authorities. Such demand can always be cancelled by passing appeal effect order and the solution is not filing of an unnecessary appeals."

Learned counsel then also relied upon a case of Sanat Products Ltd. v. Deputy Commissioner of Income Tax in which a Bench of Delhi has held as under:-

"7. ...The short and important question to be decided in this ground is whether AO can pass the appeal effect order in more than one part or not. We find that no particular procedure has been given in the Act or Rules to carry out the appeal effect..... It is mandatory on the subordinate Tribunals or authorities to carry out the directions given to them by the superior authorities or Tribunals in exercise of appellate powers. Failing to do so will result in chaos in the administration of justice. No doubt to carry out the instructions of the superior authorities there has to be existent of valid order by superior authorities giving unambiguous direction to the inferior authorities.

8. ... Of course if at the same time assessing authority is not satisfied with the order of the CIT(A) then he can prefer an appeal before the Tribunal but at the same time appeal effect has to be given. There is a practice as was pointed out by the learned Departmental Representative that appeal effect orders are being passed under section 250 r/w section 143(3) and issues which have become final are dealt in such orders and accordingly fresh demand, if any, is raised. ....Following this principle it can be seen that similarly AO is bound to pass an order in conformity of the orders passed by the first appellate authority or the Tribunal which in common parlance is known as "appeal effect order.

9. ....We are of the opinion that once some of the issues which have been confirmed or deleted by the first appellate authority have become final then AO is duty bound under the law to pass an appeal effect order in respect of the same and raise fresh demand and/or issue refund order accordingly."

Although learned counsel submits that the judgments/cases as referred above are not binding to this Court but the same are persuasive in nature. Copies of judgments are available on record.

On the other hand learned counsel for the defendants has objected to the maintainability of the suit and submitted that there is no question of issuance of

any notice of demand since notices have already been issued earlier and all that was sought to be recovered is in compliance of the decision of the appellate forum and the appeal effect is not mandatory. Learned counsel however submitted that in case plaintiff succeeds the amount sought to be refunded through the application in hand would either be returned or adjusted hence at present the prayer of the plaintiff that the amount be returned to their account is not justified and the application in hand is liable to be dismissed.

Heard learned counsel and perused the material available on record.

It appears that on 10.06.2015 Commissioner Inland Revenue (Appeals) Zone III-Karachi was directed to decide the plaintiff's appeal on or before 25.06.2015 and that till final disposal of the plaintiff's appeal by the commissioner concerned the defendants were restrained from taking any coercive action against the plaintiff. However, the present dispute relates to the recovery issue in pursuance of orders of the commissioner allegedly passed on 26.06.2015 which was allegedly received by the plaintiff on 29.06.2015. The tabulation as made by the plaintiff in Annexure Q (Page 193) is not disputed by the plaintiff wherein pertain heads of accounts were either deleted or sent for rectification under section 221 of Ordinance, 2001. No doubt there were certain heads which were maintained.

In terms of section 124(4) of Ordinance, 2001 it appears that where direct relief is provided in order under section 129 or 132, the commissioner shall issue appeal effect orders within two months of the date of commissioner is served with the order. In pursuance of section 137(2) it appears that where any tax is payable under an assessment order or an amended assessment order or any other order issued by the commissioner under the Ordinance, 2001 a notice shall be served upon the taxpayer in the prescribed form specifying the amount payable and thereupon the sum so specified shall be paid within 15 days from the date of service of the notice. Thus, in my view earlier notice, as suggested by learned counsel for the defendant, is not sufficient compliance of section 137(2) which independently talks about the assessment order or an amended assessment order or any other order issued by the commissioner under Ordinance, 2001. The original demand notice was issued prior to amended assessment hence under no stretch of imagination it could be a sufficient compliance of issuing notice of demand in pursuance of amended assessment providing them an opportunity of 15 days and specifying the total amount in pursuance of amended assessment. Thus in my view the decisions/cases relied upon by the learned counsel for the plaintiff though are not binding but persuasive in nature as the compliance of sections 124(4) and 137(2) of Ordinance, 2001 are necessary. The appeal effect order is an amended assessment tabulation and it has to be given effect like any other amended decree.

At this stage and in view of the above, I would direct the defendants to deposit within one week the amount that has been recovered by them from Standard Chartered Bank and Industrial Commercial Bank China (ICBC) from the accounts of plaintiff, collectively to the tune of Rs.851,148,487/-, with the Nazir of this Court who on receipt of such amount shall invest it in some profit bearing scheme till further orders.

SL/C-5/Sindh  
accordingly.

Order